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No. 88-188

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

PETER J. PALUGHI,

Petitioner,

v.

CITY OF MOBILE, A Municipal Corporation; GARY GREENOUGH, LAMBERT MIMS and ROBERT DOYLE, Individuals,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF OF RESPONDENTS CITY OF MOBILE, GARY GREENOUGH, LAMBERT MIMS and ROBERT DOYLE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment to the United States Constitution requires that Petitioner, a property owner, be given notice and an individual hearing before condemnation proceedings are commenced so that Petitioner can participate in the City of Mobile's decision-making process and challenge the wisdom of the City's condemnation of his property for use in a downtown urban redevelopment plan?

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STATEMENT OF THE CASE AND FACTS

In December 1984, Respondent The City of Mobile filed a petition in the Probate Court of Mobile County seeking to condemn Petitioner Palughi's property, located in downtown Mobile. At the time, Respondents Lambert Mims, Gary Greenough and Robert Doyle were the City Commissioners. Condemnation of Petitioner's property is part of the City of Mobile's attempt to resurrect its downtown economy, to restore and replace many of its deteriorated and vacant downtown buildings, and to re-establish its downtown area as an asset to (rather than a drain on) the City. (TR-15-16, TR-28, TR-46).

Petitioner has vigorously—and unsuccessfully—opposed the condemnation of his property in every court in which this case has been litigated. In 1985, after five days of trial, the Probate Court of Mobile County granted the City of Mobile's Petition for Condemnation. Petitioner then appealed to the Circuit Court of Mobile County for a trial de novo where, after another week-long trial in which 27 witnesses testified, the Circuit Court ruled that condemnation of Petitioner's property is for a public purpose and that Respondent City of Mobile has the right to condemn Petitioner's property.

After deciding that condemnation of Petitioner's property is for a public purpose, the Circuit Court ruled that Petitioner's "wrongful condemnation" counterclaims against all the Respondents were barred on principles of res judicata and/or collateral estoppel. The rationale for this ruling was that there can be no recovery for "wrong condemnation" where condemnation is for a public pur-

pose. The jury awarded Petitioner $150,000 as compensation for the taking of his property, that amount being the fair market value of the house and land. (R-172).

Petitioner then appealed unsuccessfully to the Alabama Supreme Court, which affirmed the trial court. A copy of the opinion is attached hereto as Appendix A.

Facts

Petitioner lives in and practices law out of a house located on property in Fort Conde Village, which is a collection of historical buildings and some newer buildings in downtown Mobile. The Village is located next to a replica of Fort Conde which was reconstructed by the City in 1976 in conjunction with the bicentennial anniversary of the United States. (TR-43). Respondent City of Mobile spent in excess of five million dollars ($5,000,000.00) to build and finance the construction of the Fort itself (TR-237), and spent another two million dollars ($2,000,000.00) in operational and maintenance expenses on the Fort between 1976 and 1985. (TR-240-241, Exhibit 18).

In late 1983 or early 1984 Respondent City of Mobile surveyed the Village and found that the whole area had deteriorated so badly that forty percent (40%) of the buildings were open to the weather and required extensive renovation, sixty-five percent (65%) of the buildings were unoccupied, and twenty-four percent (24%) of the lots were vacant. (TR-292).

In March 1984, Respondent City of Mobile developed the Fort Conde Redevelopment Plan, which is a general plan, or framework, for redevelopment of the Fort Conde Village—both physically and economically. (TR-199, TR-

296). The plan gives the City of Mobile the authority to acquire any property within the redevelopment area for the purpose of economic development, and also authorizes the City to designate a central management organization —such as a developer—to guide the future activities within the Village during and after redevelopment. (TR-300, City of Mobile Exhibit 3). The redevelopment plan identifies the overall redevelopment area but does not designate which properties within that area the City of Mobile would acquire and which it would not. (TR-301). Nor does the plan specify whether the City or a private developer would actually redevelop the area. (TR-301). The plan gives the City flexibility as to how redevelopment would be achieved, and who would actually redevelop the area. (TR-301). It was drafted without any particular developer in mind and none of the Village property owners—including Petitioner—had any input into the creation of the redevelopment plan or the City of Mobile's decisions concerning which Village properties it would acquire. (TR-302).

The Need for Petitioner's Property

At the time of trial in the Circuit Court of Mobile County, Respondent City of Mobile had spent more than 1.72 million dollars to pay for Village properties it had already acquired. (TR-241). With the single exception of Petitioner's parcel of property, all of the Village properties presently needed for the project have been acquired. There is a small vacant parcel at the rear of a restaurant which the City intends to acquire should the developer need it. (TR-22, TR-24, TR-25, TR-26).

The Respondents have retained a developer who has hired architects, has solicited proposals from construction companies and has hired a firm to develop leasing plans. (TR-439-441, City of Mobile Exhibits 15-17 and 33, 34, 47 and 54). As of October 1, 1986, the developer had incurred expenses of $319,000 on the project (TR-527), but it is unwilling to move forward until Petitioner's property is acquired because that property is essential to the economic viability of the redevelopment project. (TR-456, TR-501, TR-455, TR-458, TR-460, TR-461-462, TR-474-475, TR-505, TR-511, TR-512).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because (1) the precise ground for review asserted by Petitioner has been disposed of by prior United States Supreme Court decisions and, consequently, there is no substantial question, (2) the decision of the Alabama Supreme Court rests on adequate and independent state grounds.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Substantial Federal Question

Petitioner challenges the constitutionality of the condemnation of his property for use in a downtown redevelopment project. He attempts to resist the inclusion

of his property in the redevelopment plan by claiming that his property "had been rehabilitated or met the objectives of the redevelopment plan." (Petition for Writ of Certiorari, p. 15).

Specifically, in this proceeding Petitioner attempts to resist condemnation by arguing that he was entitled to notice and a hearing, at a point in time *before* the City commenced condemnation proceedings, to argue that his property "had been rehabilitated or met the objectives of the revelopment plan." In short, Petitioner contends he was unconstitutionally deprived of the right to participate in the City's decision-making process as to which properties within the redevelopment area should or should not be acquired. However, this argument is so explicitly foreclosed by prior Supreme Court decisions as to leave no room for controversy. Thus, there is no substantial federal question presented and the petition is due to be denied. See, e.g. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 345 (1902); *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902).

It is well settled law that due process does *not* require notice and a hearing prior to the City's institution of condemnation proceedings. The United States Supreme Court has spoken consistently and clearly on this precise issue. In *Sears v. City of Akron,* 246 U.S. 242 (1918), for example, a property owner attacked the constitutionality of a state statute granting the power of eminent domain to the City of Akron, asserting that affected property owners were excluded from the decision-making process. The United States Supreme Court flatly rejected this argument, which is identical to Petitioner's:

> Petitioner contends that the ordinance is void because the general statute which authorized the appropriation violates . . . the Fourteenth Amendment, in that it authorized the municipality to determine a necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity . . . It is well settled that while the question whether the purpose of a taking is a public one is judicial . . . The necessity and the proper extent of a taking is a legislative question.

246 U.S. at 251.

Seven years later the United States Supreme Court reaffirmed its position. In *North Laramie Land Co. v. Hoffman,* 268 U.S. 276 (1925), the court rejected the due process argument identical to Petitioner's that procedural due process requires notice and an opportunity to be heard before the commencement of condemnation proceedings:

> There remains for consideration the plaintiff's objection . . . that plaintiff was afforded no opportunity for a hearing before the appraisers or the board of county commissioners with respect either to the location of the road or the damage suffered by plaintiff by the opening of the road. The taking of property provided for by the statute is a taking of land under the direction of public officers for a public use . . . *The necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.*

268 U.S. at 284 (emphasis added).

Both *Sears v. City of Akron,* supra, and *North Laramie Land Co. v. Hoffman,* supra, remain controlling authorities and have been so recognized in more recent de-

cisions by lower courts. *Joiner v. City of Dallas,* 380 F. Supp. 754 (N.D. Texas 1974) is an example. In reviewing the constitutionality of a state condemnation statute which did not provide for a public hearing prior to the Dallas City Council's decision to condemn private property, the court held:

> Focusing now upon the eminent domain statutes, plaintiffs first attack the absence of certain procedural requirements accompanying the process by which the condemnor makes the decision that appropriation of private property is necessary. *Plaintiffs argue that condemnors should be required to give actual notice to property owners that their property might become the subject of condemnation proceedings, to conduct public hearings on the issue of condemnation, to conduct planning studies, and to record their proceedings for public examination and review.* The simple answer to plaintiffs' argument lies in the well settled body of case law that we have previously discussed.[17] *Together these decisions instruct us that because the condemning authority's decision regarding the need for a taking and the property to be taken is fundamentally legislative, landowners have no right to participate in that decision or to litigate the decision to condemn on general constitutional grounds.*

380 F. Supp. at 769 (emphasis added).

Footnote 17, contained in the above quote, refers to "Part III A" of the opinion and is located at 380 F. Supp. at 764. The relevant portion of "Part III A" reads:

> That the power of eminent domain must be exercised in accordance with due process of law is an explicit requirement under the Fourteenth Amendment. The perimeters of the due process requirement in eminent domain proceedings have been sharply defined through a series of Supreme Court decisions, however, and the

customary "due process" attack has limited chance of success. For example, the Court has repeatedly characterized the condemnors' decision on the necessity for a taking and the quantity to be appropriated as legislative and has, therefore, denied to landowners the right to participate in that decision-making process or to litigate on federal constitutional grounds the decision to condemn private property. See *United States v. Welch*, 327 U.S. 546, 557, 66 S. Ct. 715, 90 L. Ed. 846 (1946), (Reed, J., concurring); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284, 45 S. Ct. 491, 69 L. Ed. 953 (1925); *State v. City of Chattanooga*, 264 U.S. 472, 483, 44 S. Ct. 369, 68 L. Ed. 796 (1924); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 708, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); *Joslin Co. v. Providence*, 262 U.S. 668, 678, 43 S. Ct. 684, 67 L. Ed. 1167 (1923); *Bragg v. Weaver*, 251 U.S. 57, 58, 40 S. Ct. 62, 64 L. Ed. 135 (1919); *Sears v. City of Akron*, 246 U.S. 242, 251, 38 S. Ct. 245, 62 L. Ed. 688 (1918); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 65, 33 S. Ct. 667, 57 L. Ed. 1063 (1913); *Adirondack Ry. Co. v. New York*, 176 U.S. 335, 349, 20 S. Ct. 460, 44 L. Ed. 492 (1900); *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 568, 18 S. Ct. 445, 42 L. Ed. 853 (1898); *United States v. Gettysburg Elect. Ry. Co.*, 160 U.S. 668, 685, 16 S. Ct. 427, 40 L. Ed. 576 (1896); *Sweet v. Techel*, 159 U.S. 380, 393-395, 16 S. Ct. 427, 40 L. Ed. 188 (1895); *Shoemaker v. United States*, 147 U.S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170 (1893); *Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L. Ed. 206 (1878); see also *Berman v. Parker*, 348 U.S. 26 (1954).

(Emphasis added).

Petitioner bases his argument that he was entitled to participate in the City's decision-making process as to which properties would and would not be acquired on the following clause in the Fort Conde Redevelopment Plan: "Such properties may be exempted from acquisition upon

determination by the City of Mobile that said properties have been redeveloped and/or that conditions exist to the extent that said properties satisfy the objectives of the plan." This clause, upon which Petitioner so heavily relies, does no more than re-state the well established law that the decision to condemn or not condemn particular parcels within the redevelopment area is within the sound discretion of the City. The clause merely preserves the City's authority to choose which properties will and will not be condemned. It does not provide for, require or authorize property owner participation in this determination and, in fact, there was no property owner participation in this determination.

Whether Petitioner's land was necessary for the redevelopment plan was a question within the City of Mobile's sound discretion and Petitioner had no right to a hearing before the City Commission to oppose the wisdom or necessity of condemnation. As this court stated in *Berman v. Parker,* 348 U.S. 25, 36 (1954):

> It is not for the Courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the Legislative Branch.

See also *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).

Petitioner has failed to cite a single case where the procedural argument he raises was decided in favor of a property owner. The complete lack of legal authority to

support the Petition for Writ of Certiorari stands in stark contrast to the legion of United States Supreme Court cases and lower court cases cited herein by the Respondents which dispose of the precise procedural argument Petitioner asserts.

II. The Alabama Supreme Court Based Its Decisions On Independent And Adequate And Independent State Grounds

The Alabama Supreme Court affirmed the trial court and held that condemnation of Petitioner's property was for a "public purpose" as required by Alabama statute. Specifically, the Alabama Supreme Court stated:

> The first issue raised is whether the trial court erred in ruling that the City of Mobile could lawfully condemn Palughi's property. Private property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss. *Nicrosi v. City of Montgomery,* 406 So. 2d 951 (Ala. Civ. App. 1981). Whether a condemnation is for the public good is a question to be determined by the trial court. Section 18-1A-151, Code of Alabama (1975). *Therefore, because the Alabama state legislature has recognized downtown redevelopment projects as promoting the public good and the general welfare (see Section 24-3-1 et seq.),* and because Palughi was awarded $150,000 by the jury as compensation, *we hold that the trial court was correct in granting the city's condemnation petition.*

Appendix A, page App. 2 (emphasis added).

It is essential to note that Petitioner has never challenged the constitutionality of any of the state condemnation statutes pursuant to which the Fort Conde Redevelopment Plan was adopted. None of these statutes provides

or requires that Petitioner be given notice and an individual hearing *before* the time condemnation proceedings are commenced in the Probate Court. Since the applicable condemnation statutes do not require notice and an individual hearing before the commencement of condemnation proceedings, and the City, relying on these statutes, provided Petitioner no individual hearing, then Petitioner cannot logically argue that the City's action is unconstitutional while the statutes are not. In short, Petitioner cannot attack the actions of the Respondents without attacking the Alabama condemnation statutes which authorize those actions.

The Alabama Supreme Court expressly held that the taking of Petitioner's property was permissible under the applicable Alabama condemnation statutes. Since the decision of the Alabama Supreme Court rests on state condemnation statutes which Petitioner has never challenged, the Alabama Supreme Court's decision is based on adequate and independent state grounds and the Petition for Writ of Certiorari is due to be denied. *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Klinger v. Missouri,* 13 Wall. 257, 263 (1871).

It is also important to note that Petitioner's argument (i.e., that he was entitled to notice and an individual hearing before the commencement of condemnation proceedings) is based *solely* on a single clause in the Ft. Conde Redevelopment Plan. Thus, it is clear that the procedural question Petitioner raises arises out of the unique facts of this particular case—i.e., a *single* clause in a *local* urban redevelopment plan. Therefore, the Petition for Writ of Certiorari is due to be denied because this case, although

important to the parties involved, presents no issue which is substantial enough in terms of importance to the general public to warrant review on the merits by the United States Supreme Court. See, *Layne & Bowler Corp. v. Western Wellworks,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetary,* 349 U.S. 70, 79 (1955).

—o—

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1987-88

Peter J. Palughi

86-310 v.

City of Mobile, et. al.

Appeal from Mobile Circuit Court

SHORES, JUSTICE

This is an appeal from a condemnation case in which the trial court granted the City of Mobile's December 1984 petition to condemn property of Peter Palughi for use in a downtown redevelopment project. The petition was granted by the Mobile County Probate court, and Palughi appealed to the Circuit Court of Mobile County for a trial de novo. In the Circuit Court, Palughi filed an amended answer, which included numerous affirmative defenses based on alleged "wrongful condemnation"; a compulsory counterclaim against the City; and a third-party complaint against three former city commissioners. The counterclaim and the third-party complaint were based on the same wrongful condemnation theories as Palughi's affirmative defenses. The case was tried in the circuit court beginning October 20, 1986.

At the close of all the evidence, the trial judge granted the condemnation, and directed verdicts in favor of the three former city commissioners on the third-party complaint. The issue of compensation and the wrongful-con-

demnation counterclaim were submitted to the jury, and Palughi was awarded $150,000 as compensation. However, the jury could not reach a decision concerning the counterclaim. Consequently, the city filed a motion for judgment notwithstanding the verdict, as to the counterclaim on the ground of res judicata or collateral estoppel, asserting that the court's decision that the condemnation was lawful barred the jury's consideration of the wrongful-condemnation counterclaim. This motion was granted, and Palughi appealed.

The first issue raised is whether the trial court erred in ruling that the City of Mobile could lawfully condemn Palughi's property. Private property may be condemned if it is being taken for a recognized public use, and the owner is compensated for his loss. *Nicrosi v. City of Montgomery*, 406 So. 2d 951 (Ala. Civ. App. 1981). Whether a condemnation is for the public good is a question to be determined by the trial court. Section 18-1A-151, Code of Alabama (1975). Therefore, because the Alabama state legislature has recognized downtown redevelopment projects as promoting the public good and the general welfare (see Section 24-3-1 et seq.), and because Palughi was awarded $150,000 by the jury as compensation, we hold that the trial court was correct in granting the city's condemnation petition.

The second issue presented is whether the trial court erred when it entered a judgment notwithstanding the verdict, in favor of the City on Palughi's counterclaim. This counterclaim was based on the theory that the City's condemnation of Palughi's property was unlawful, the same theory upon which Palughi's unsuccessful affirmative de-

fenses had been based. Consequently, once the court decided, correctly, that the City had the right to condemn, and the jury fixed the compensation award for the taking, there could be no recovery on the counterclaim for wrongful condemnation.

The final issue raised by Palughi is whether the court entered the order of condemnation before it heard all of the evidence. The basis of this argument is an unsigned, uninitialed, entry on the case action summary sheet which indicates that an order of condemnation was entered on October 20, 1986, the first day of the week-long trial. From this, Palughi argues that the court prejudged his case. We disagree.

Upon learning of the October 20, 1986 entry on the case action summary sheet, the City filed a motion to correct a clerical mistake in accordance with A.R.Civ.P. 60 (a). A hearing was held, and the motion was granted. At the hearing, evidence was presented that the October 20 entry was a mistake, and that it was made as the result of the routine procedure followed by the Mobile County Clerk's office in condemnation cases, rather than at the instruction of the trial court. Furthermore, the case action summary sheet contains a second order of condemnation, entered October 28, at the close of the trial. In contrast to the October 20 order, this October 28 entry was a written order signed by the trial judge.

After reviewing the hearing transcript, we hold that the trial court did not prejudge Palughi's case, and that the court's ruling to allow correction of the case action summary sheet was supported by the evidence. Consequently, the trial court's order of condemnation and the

judgment notwithstanding the verdict are due to be affirmed.

AFFIRMED.

Torbert, C. J., and Jones, Adams, and Steagall, JJ., concur.